U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: AUG 0 1 2013 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Elizabeth M'Cormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is the beneficiary. The beneficiary seeks classification as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1]

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's February 20, 2013 denial, the single issue in this case is whether or not the petitioner has established that he is a U.S. employer, and the job offer is supported by a Department of Labor (DOL) approved ETA From 9089, Application for Alien Employment Certification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

Here, the Form I-140 was filed on September 4, 2012. On Part 2.d. of the Form I-140, the beneficiary indicated that he was filing the petition for a member of the profession holding an advanced degree or an alien of exceptional ability (Who is not seeking a National Interest Waiver).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2] On appeal, the beneficiary states that he made a typographical error on Form I-140 and that he intended to check Part 2.a. indicating that he was self-petitioning for himself as an alien of extraordinary ability.

Further, the record indicates that the petitioner attempted to clarify before the director that he intended to be considered an alien of extraordinary ability on the Form I-140. This is evidenced in a written response to the director on November 20, 2012. However, the record contains no initial evidence establishing his extraordinary abilities. Nor did he supply evidence that he submitted supporting evidence to the director. Although he claims to have submitted evidence; however, the record does not contain any evidence of his extraordinary or exceptional ability or that any initial evidence to illustrate these qualities was received by the director.

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[1] Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees, whose services are sought by an employer in the United States.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The director declined to reclassify the petition, as the beneficiary did not submit any evidence in support of a classification as an alien of extraordinary ability. The AAO affirms the decision of the director denying the beneficiary's request to reclassify the petition to one for an alien of extraordinary ability under Section 2.a. of the Form I-140, under the Act, 8 U.S.C. § 1153 (b)(1)(A). The record is devoid of any evidence that the beneficiary meets any of the requirements at 8 C.F.R. § 204.5 (h)(3)(i-x).

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The evidence submitted does not establish that the petition is supported by an approved Form ETA 9089, or that the beneficiary possesses an advanced degree or exceptional ability, or that a bona fide job opportunity exists.

Further, every petition filed to classify an alien beneficiary as an employment-based immigrant under section 203(b)(2) of the Act must be accompanied by an individual labor certification issued by DOL. *See* 8 C.F.R. § 204.5(l)(3)(i). Without an appropriate certification from DOL, the AAO is without statutory authority to approve a petitioner's employment-based third preference immigrant petition.

Moreover, the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought
>
> (C) A license to practice the profession or certification for a particular profession or occupation
>
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability
>
> (E) Evidence of membership in professional associations

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

Where the petitioner fails to submit the requisite evidence, the proper conclusion is that the petitioner failed to satisfy the regulatory requirement of three types of evidence. *See Kazarian v. USCIS*, 596 F.3d 1115, 1122 (9th Cir. March 4, 2010).

Further, the petition was electronically filed on April 1, 2013, the regulation at 8 C.F.R. § 103.2(a)(1) provides that the instructions for filing applications and petitions are "incorporated into the particular section of the regulations in this chapter requiring its submission." The instructions for electronic filing a Form I-140 and the general electronic filing instructions regarding the submission of supporting documentation are available at www.uscis.gov. The instructions for electronic filing provide that if the petitioner does not submit the required initial evidence in the requisite time period,[3] the petitioner "will not establish a basis for eligibility and we may deny your petition or application." The petitioner did not submit the required initial evidence within seven business days[4] from the date of electronic filing. Thus, the petitioner did not establish a basis for eligibility and the director did not err in denying the petition. If all required initial evidence is not submitted with the application or petition, or does not demonstrate eligibility, USCIS, in its discretion, may deny the petition. 8 C.F.R. § 103.2(b)(8)(ii)(rule effective for all petitions filed on or after June 18, 2007).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

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[3] Seven business days.

[4] The supporting documentation was not submitted.